

REAL ESTATE JUKEBOX

Allen Matkins
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September 1, 2011

"Don't You (Forget About Me)"

Protecting a Judgment Lien Creditor's Interest in Real Property upon Foreclosure

Dubious congratulations are probably in order when a creditor obtains a judgment lien on a debtor's real property that is already encumbered by a mortgage or deed of trust. After all, foreclosure of the mortgage lender's lien will extinguish the judgment creditor's lien. If the debtor has any equity in the real property, then the judgment creditor will want to protect its interests by keeping a watchful eye on the actions of the mortgage lender with respect to the real property.

WARNING: It is not sufficient to record an abstract of judgment against the real property!

PRACTICE TIP: A judgment creditor should always file, with the recorder's office of the county in which the real property is located, a request for a copy of any notice of default or notice of sale even if the judgment creditor has already recorded an abstract of judgment. The request should be in the statutorily prescribed form.* It should specify the name and address of the person to whom notices should be mailed, and it should identify the deed of trust (including the names of the parties, the date of recordation and the recording information). The request must be signed by the person making the request and must be notarized.

THE PROBLEM: The California Court of Appeal has held that a foreclosure trustee had no duty to disburse proceeds from the foreclosure of a deed of trust to a junior judgment creditor who had not filed a request for a copy of any notice of default or notice of sale.**

THE STORY: A borrower defaulted on its loan secured by a deed of trust, and the lender commenced nonjudicial foreclosure proceedings. The lender recorded a notice of default followed by a notice of sale. Prior to the foreclosure sale, a creditor obtained a judgment against the borrower and recorded an abstract of judgment. At the sale, the real property sold for an amount well in excess of the debt owed to the lender. The trustee under the deed of trust paid the amount owed on the loan, deducted costs and trustee fees, and disbursed the excess sale proceeds to the borrower. The court held that the trustee had no duty to search the records for a judgment lienholder who had not filed the statutorily prescribed request for a copy of any notice of default or notice of sale. Although, in the particular case, the notice of sale

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had already been recorded prior to the judgment creditor's recording the abstract of judgment, the court's ruling was broad enough to apply even if no notice of default or notice of sale had been recorded at the time of recordation of the abstract of judgment.

* California Civil Code § 2924b.

** *Banc of America Leasing & Capital, LLC v. 3 Arch Trustee Services, Inc.* (2009) 180 Cal.App.4th 1090.



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